Supreme Court, U.S.
FILED
SEP 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-382

IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM 1989**

ISIAH SMITH, EDDIE THOMPSON, JR.,

Petitioners

vs.

KENTUCKY DEMOCRATIC PARTY, PAT GOINS, DEMOCRATIC NATIONAL COMMITTEE, COMPLIANCE ASSISTANCE COMMITTEE, STANDING COMMITTEE ON CREDENTIALS, K. LEROY IRVIS,

Respondents

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTIONS PRESENTED

(1) UNDER FEDERAL LAW, ARE CUSTOMS, HABITS, PARTY RULES AND/OR REGULATIONS WHICH CLEARLY DENY EQUAL PROTECTION OF VOTING RIGHTS OF VOTERS AND/OR CANDIDATE BECAUSE OF VOTERS AND/OR CANDIDATE'S RACE, INVALID?

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## TABLE OF AUTHORITIES

## UNITED STATES CONSTITUTION

First Amendment — Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridge the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fourteenth Amendment — No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fifteenth Amendment — The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Nineteenth Amendment — The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

## FEDERAL STATUTES

28 U.S.C.A. § 1331 — The District Court shall have original jurisdiction of all civil actions arising under the constitution, laws and treaties of the United States.

28 U.S.C.A. § 1343(4) — To recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C.A. § 1983 — Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution

and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C.A. § 1985 — If two or more persons in any state or territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for president or vice-president, or a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

## FEDERAL CIVIL RULES

Rule 7(a) — There shall be a complaint and an answer. . . .

Rule 7(b)(1) — An application to the court for an order shall be by motion which, unless during a hearing or trial, shall be in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. . . .

Rule 7(c) — Demurrers, pleas, and exceptions for insufficiency of pleading shall not be used.

Rule 8(b) — A party shall in short and plain terms state his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. . . .

Rule 8(d) — Averments in a pleading which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.

Rule 55(a) — When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk *shall* enter the party's default.

NO. _____

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ISIAH SMITH, EDDIE THOMPSON, JR.,

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vs.

KENTUCKY DEMOCRATIC PARTY, PAT GOINS, DEMOCRATIC NATIONAL COMMITTEE, COMPLIANCE ASSISTANCE COMMITTEE, STANDING COMMITTEE ON CREDENTIALS, K. LEROY IRVIS,

Respondents

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Comes now Petitioners, Isiah Smith and Eddie Thompson, Jr., (hereinafter Petitioners) and respectfully pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit.

## OPINION BELOW

The Order of the District Court was entered on July 19, 1988, (App. P. 13a). Motion for reconsideration was Denied

on August 30, 1988. (App. P. 17a). Notice of Appeal was filed on September 27, 1988. (NR 23). The Sixth Circuit Court of Appeals Affirmed, in an unpublished Decision on April 13, 1989. (App. P. 18a). Petition for Rehearing en banc was Denied on June 5, 1989. (App. P. 20a)

## JURISDICTION

The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and 2101(c).

Petition for rehearing en banc was Denied on June 5, 1989, (App. P. 20a), and this Petition for Writ of Certiorari is filed within ninety (90) days of that date.

The following Decisions of this Court sustain jurisdiction:

*Baker* v. *Carr*, 369 U.S. 186 (1962)
*Gomillion* v. *Lightfoot*, 364 U.S. 339
*Gray* v. *Sanders*, 372 U.S. 368
*Lubin* v. *Panish*, 415 U.S. 709 (1974)
*Moore* v. *Ogilive*, 394 U.S. 814 (1969)
*Smith* v. *Allwright*, 321 U.S. 649 (1943)
*Williams* v. *Rhodes*, 393 U.S. 23 (1968)

## STATEMENT OF FACTS

Petitioners, Registered Democratic Voters of Kentucky, Fourth Congressional District, and pledged supporters of Jesse Jackson; who voted in the State's March 8, 1988 binding Presidential Preference Primary Election, brought the instant action to challenge the Democratic Party's Rules which fail to allocate Convention Delegates on a Pro Rata bases in Congressional Districts with a sparse black population. See Complaint, NR 1, App. P. 4a.

Petitioners sought, *inter alia*, a Declaratory Judgment that the practices, customs, and policies relative to allocation of Kentucky Delegates to the Democratic National Convention

based upon the Presidential Preference Primary held in Kentucky on March 8, 1988, is unconstitutional and void in that it:

(a) Violates the one man, one vote rule.

(b) Denies equal protection of the law under the First, Fourteenth, Fifteenth, and Nineteenth Amendments to the U.S. Constitution.

(c) Denies due process of law under the First, Fourteenth, Fifteenth, and Nineteenth Amendments to the U.S. Constitution.

(d) Violates Petitioners' rights under the First, Fourteenth, Fifteenth, and Nineteenth Amendments to the U.S. Constitution.

(e) Exceeded the authority of Respondents under Federal Law. (NR 1, App. P. 8a)

Respondents did not answer or deny the allegations in the complaint.

The District Court did not hold a hearing on the merits of Petitioners' claims, as the Order for such hearing was entered after the date set for such hearing. (NR 13, App. P. 11a)

The District Court Concluded that Petitioner's Constitutional claims were "not justiciable" in Federal Court according to the political question doctrine which the Supreme Court outlined in *Baker* v. *Carr*, *supra*. (NR 19, App. P. 13a)

## REASONS FOR GRANTING THE WRIT

**(1) Under Federal Law, Are Customs, Habits, Party Rules and/or Regulations Which Clearly Deny Equal Protection of Voting Rights of Voters and/or Candidate Because of Voters and/or Candidate's Race, Invalid?**

At the call of the docket on June 10, 1989, and without letting Petitioners present any facts of the case, the Court Ordered petitioners (plaintiffs) to file a Response to (1) Respondents' Memorandum in opposition to a Motion for Preliminary Injunction. (NR 9) and (2) a Response to a Motion for TRO. (NR 10)

The reference in the Court's Opinion and Order to, "the motion of plaintiffs for a preliminary injunction or defendant's motion to dismiss" (NR 19), is not borne out by the record.

Petitioners filed a complaint, (NR 1, App. P. 4a), and Respondents did not answer the complaint. Treating the objection as a Motion to Dismiss, the Court was compelled to treat as true all well pleaded facts.

The District Court's conclusion that Petitioners' constitutional claims were "not justiciable" without a hearing was clearly erroneous, and Denied Petitioners access to the Federal Courts in violation of the First Amendment to the U.S. Constitution.

On motion to dismiss, the Court was required to treat as true the material fact alleged in the complaint. *Duncan* v. *Leeds*, 742 F. 2d 989 (1984).

The failure of a defendant who has been served to appear and answer a complaint seeking a declaratory judgment constitutes an admission of every material fact pleaded which is essential to the judgment sought. *Prudential Ins. Co.* v. *Radar*, 98 F. Supp. 44 (DC Minn).

The Sixth Circuit held in *Robin Product Co.* v. *Tomeeck*, 465 F. 2d 1193 that:

A District Court's Dismissal of an action is improper without an evidentiary hearing on the issue of whether an actual controversy existed between the parties requiring a declaratory judgment.

One of the principle purposes of pleading is to develop the precise points in dispute by formulating the issues to be tried. *Perry* v. *Livington*, 296 S.W. 2d 217 (KY 1956).

A justiciable Federal Constitutional cause of action is stated by a claim of arbitrary impairment of votes by invidiously discriminatory apportionment systems. *Baker* v. *Carr*, 369 U.S. 186.

In the instant of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceed to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. *Baker*, *supra* at 198.

A citizen's right to vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution, by false tally . . . refusal to count votes from arbitrarily selected precincts . . . or a stuffing of the ballot box. *Baker*, *supra* at 208.

It would not be necessary to decide whether . . . allegation of impairment of their votes . . . will, ultimately, entitle them to any relief . . . They are entitled to a hearing and to the District Court's decision on their claims. *Baker*, *supra* at 214.

A Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends on the truth of what is declared. *Baker*, *supra* at 215.

The political question doctrine, a tool for maintenance of Governmental Order, will not be applied to promote disorder. *Baker*, *supra* at 217.

The doctrine of which we treat is one of "political question" not one of "political cases." The Court cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloging. *Baker*, *supra* at 217.

In a concurring opinion, Justice Douglas said:

> There is no doubt that the Federal Courts have jurisdiction of controversy concerning voting rights. The civil right act gives them authority to redress the deprivation 'under color of any state law' of any right, privilege or immunity secured by the constitution of the United States or by any act of Congress providing for equal rights of citizens . . . 28 U.S.C. § 1343(3) and 28 U.S.C. § 1343(4) give the Federal Courts authority to award damages or issue an injunction to redress the violation of 'any act of congress providing for the protection of Civil Rights, including the right to vote.' The element of state action covers a wide range. *Baker*, *supra* at 248.

It is well settled that,

> When officials of a political party participate in what is part of State election machinery, they are election officers of the State de facto if not de jure, and as such must observe limitations of the Constitution and having undertaken to perform an important function relating to the exercise of sovereignty of the people, they may not violate the fundamental principles laid by the constitution for its exercise. *Rice* v. *Elmore*, 165 F. 2d 387 (4th Cir.)

Kentucky is the geographical area in our case.

Once the Geographical unit for which a representative is to be chosen is designated, all who participate in the election are

to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever income, and wherever their home may be in that geographical unit. *Moore* v. *Ogilvie*, 394 U.S. 814, 817.

The right to vote freely for the candidate of one's choice which manifestly encompasses the right of the candidate to a position on the ballot, lies at the essence of a democratic society and "any restrictions on that right strikes at the heart of representative government". *Reynold* v. *Sims*, 377 U.S. 533.

All procedures used by a State as an integral part of the election process must pass muster against charges of discrimination or of abridgment of the right to vote. *Smith* v. *Allwright*, 321 U.S. 649, 664.

The right of a party or individual to a place on the ballot is entitled to protection and is interwined with the rights of voters. *Lubin* v. *Panish*, 377 U.S. 533.

The Fifteenth Amendment which prohibits a State from passing any law depriving a Citizen of his right to vote on account of his race, color or previous condition of servitude, nullifies sophisticated as well as simple-minded modes of discrimination. *Gomillion* v. *Lightfoot*, 364 U.S. 339, 342. See also *Terry* v. *Adams*, 345 U.S. 461, 466.

State election laws which make it virtually impossible for any new or small party to qualify on the ballot, impose a burden on voting and associational rights which constitute an invidious discrimination, in violation of the equal protection clause of the Fourteenth Amendment. *Williams* v. *Rhodes*, 393 U.S. 24, 34.

The action of a political party in the conducting of its primary constitutes state action within the meaning of the Fourteenth Amendment, where the primary election process is regulated by the state, as where the state, through the managers it requires, collaborates in the conduct of the primary, adopts the primary as a part of the public election

machinery, and enforces the exclusions of voters made by the party's primary rules. *Gray* v. *Sanders*, 372 U.S. 368, 374.

Like any person whose right to vote is impaired, a person qualified to vote in primary and general elections in a county has standing to sue for an injunction and declaratory relief against the use of a state's county unit system as a basis for counting votes in a primary for the nomination of a United States Senator and statewide officers, and to attack the validity of the relevant state law; voluntary abandonment of an illegal practice sought to be enjoined does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and longstanding. *Gray*, *supra* at 375. The right to have one's vote counted at congressional elections has the same dignity, and is as open to protection by congress, as the right to vote itself. *Gray*, *supra* at 380.

Respondents efforts as outlined in Petitioners' Complaint, (NR 1, App. P. 4a) and Undenied, made the March 8, 1988, Presidential Preference Primary in Kentucky an exercise in futility for voters, who were Jackson supporters and/or prospective Jackson delegates in Congressional Districts with a sparse black population.

Constitutional rights would be of little value, if they could be thus indirectly Denied. *Lane* v. *Wilson*, 307 U.S. 268.

Heretofore, parties deprived of voting rights have been entitled to damages. *Nixon* v. *Herndon*, 273 U.S. 536, *Smith* v. *Allwright*, 321 U.S. 649.

## CONCLUSION

*Wymbs* v. *Republican State Executive Comm. of Fla.*, 719 F.2d 1072 and *O'Brien* v. *Brown*, 409 U.S. 1 (1972) have no application in this case. The Affirmance by the Sixth Circuit of the District Courts decision which denied Petitioners access to Court in violation of the First Amendment is clearly erroneous.

Wherefore, Petitioners pray this Court Reverse the Sixth Circuit and REMAND case back to the District Court for a hearing and an AWARD of DAMAGES on the MERITS of Petitioners' claims.

ISIAH SMITH

EDDIE THOMPSON, JR.
P.O. BOX 1221
COVINGTON, KY 41011
(606) 491-6278

## AFFIDAVIT OF PROOF OF SERVICE

Comes now Isiah Smith and Eddie Thompson, Jr., Petitioners herein, first being duly cautioned and sworn and state as follows: on August ____, 1989, I deposited in a United States Post Office, three (3) copies of the instant Petition for Writ of Certiorari, in duly addressed envelopes, with first class postage prepaid to Mr. William P. McEvoy, Mr. Michael T. McKinney, McEvoy & McKinney, P.O. Box 688, 2252 Burlington Pike, Burlington, Ky. 41005 and Mr. Stephen T. McMurtry, 308 Greenup Street, Covington, Ky. 41011; Mr. Frederic Cowan, Kentucky Attorney General Capitol Building, Frankfort, Ky. 40601; and the Solicitor General, Department of Justice, Washington, D.C. 20530.

_____

ISIAH SMITH

_____

EDDIE THOMPSON, JR.

Subscribed and sworn to before me this ____ day of August, 1989.

_____

My Commission expires

_____

NOTARY

## APPENDIX

### DOCKET ENTRIES

| | | |
|---|---|---|
| 6/ 2/88 | 1. | Complaint for Declaratory Judgment and Injunctive Relief, filed. Original and 8 copies of summons issued and handed to plaintiff for service. Complaint w/ attachments. (lmb) |
| 6/ 6/88 | 2. | Motion by pltf. to Limit the Number of Days to Answer the Complaint and Interrogatories to 7 days, filed. (lmb) |
| 6/ 6/88 | 3. | Plaintiffs Interrogatories to Defendants, filed. (lmb) |
| 6/ 6/88 | 4. | Plaintiffs Interrogatories to Defendants, filed. (lmb) |
| 6/ 6/88 | 5. | Summons as to General Counsel to Kentucky Democratic Party executed on 6/2/88, filed. (lmb) |
| 6/ 6/88 | 6. | Summons as to Chairman, Democratic National Committee executed on 6/2/88, filed. (lmb) |
| 6/ 6/88 | 7. | Summons as to Chairman, Standing Committee on Credentials executed on 6/2/88, filed. (lmb) |
| 6/ 6/88 | 8. | Summons as to Wallace G. Wilkinson, Governor of Ky. executed on 6/2/88, filed. (lmb) |
| 6/ 9/88 | 9. | Memorandum in Opposition to Motion for Preliminary Injunction, filed by deft. Kentucky Democratic Party. |

| | | |
|---|---|---|
| 6/10/88 | 10. | Response to Motion for a TRO, filed by deft. Democratic National Comm., filed. (lmb) |
| 6/10/88 | 11. | Civil Minutes-General; file ent. on 6/10/88 case was called for a hearing on plffs motion for Temporary Restraining Order, at which time said matter was taken under advisement; (1) plffs are given until Monday, June 13, 1988 within which to file a Response to defts response; (2) defts are given a period of 3 days thereafter within which to file a reply thereto. CC noted. (lmb) |
| 6/14/88 | 12. | Memorandum of Law, filed by plaintiffs. (lmb) |
| 6/14/88 | 13. | Order: (WOB) ent; Hearing on motion of plaintiffs for a preliminary injunction—set for Friday, June 10, 1988 at 10:00 A.M. Copies as noted. (lbb) |
| 6/16/88 | 14. | Defendant's Brief in Support of Dismissal (Democratic National Committee). (lbb) |
| 6/17/88 | 15. | Kentucky Democratic Party Reply Memorandum. (lbb) |
| 6/27/88 | 16. | Motion for Default Judgment and Hearing on Merits, filed by plff. (lmb) |
| 6/30/88 | 17. | Response to Motion for default Judgment, filed by deft. The Democratic National Committee. (lmb) |
| 7/19/88 | 18. | Judgment (WOB): fil; ent 7/19/88; It is Ordered and Adjudged that the complaint is hereby dismissed with prejudice at cost of plff. CC noted. (lmb) |
| 7/19/88 | 19. | Opinion and Order (WOB): Fil: Ent: it is ordered that motion of defts be granted to dismiss. A separate Judgment will enter concurrent herewith. CC noted. (lmb) |

| | | |
|---|---|---|
| 7/29/88 | 20. | Motion to Reconsider Opinion and order of 7/19/88, filed by plff. (lmb) |
| 8/11/88 | 21. | Response to motion for new trial or to amend the judgment, filed by defts. (lmb) |
| 8/30/88 | 22. | Order (WOB); fil; ent; matter before court on motion of plffs for court to reconsider Opinion and Order of 7/19/88 It is Ordered that plffs motion to reconsider be Denied. (lmb) |
| 9/27/88 | 23. | Notice of Appeal, Filed by Plffs. (lmb) |
| 9/29/88 | | Transmission Form to CCA Along With Notice of Appeal and Order of July 19, 1988 w/ Opinion and Order of August 30, 1988 and mailed to all counsel of record. Plffs handed to them in this office. Record to be sent when transcript filed. (lmb) |
| 10/11/88 | 24. | Copy of Supplemental Advising Case Number of 88-6114, filed. (lmb) |
| 10/17/88 | 25. | Transcript of proceedings on June 10, 1988 at 10:15 a.m. before Judge William O. Bertelsman, filed. (lmb) |
| 10/18/88 | 26. | Transmission Form to CCA sending certified record on appeal that 1 volume pleadings, 1 volume transcript. cc noted. (lmb) |

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

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NO. 88-99

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EDDIE THOMPSON, JR., ISIAH SMITH

Plaintiffs

vs.

KENTUCKY DEMOCRATIC PARTY, PAT GOINS, DEMOCRATIC NATIONAL COMMITTEE, COMPLIANCE ASSISTANCE COMMITTEE, STANDING COMMITTEE ON CREDENTIALS, K. LEROY IRVIS,

Defendants

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**COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**
(Filed June 2, 1988)

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Come now Eddie Thompson, Jr. and Isiah Smith, plaintiffs herein (hereinafter plaintiff), first being duly cautioned and sworn and state as follows:

(1) Plaintiffs are black registered Democratic Voters of Kentucky (4th Congressional District), voted in the March 8 Primary, were Jackson supporters, and were prospective participants in the selection of delegates to the Democratic National Convention.

(2) As a result of the March 8 Primary, it was widely reported by news sources that Jackson had met the 15 per cent threshold requirement for delegates in Kentucky.

(3) Plaintiff registered as a prospective delegate for Jackson to the Democratic National Convention to be convened in Atlanta in July 88.

(4) Plaintiff was told by the Kentucky Democratic Party that Jackson received no delegate in the 4th Congressional District, but that plaintiff could register as a delegate for another candidate.

(5) Plaintiff rejected that offer and requested the Kentucky Democratic Party to make its official election returns available to plaintiff.

(6) The Kentucky Democratic Party said, "the final figures were not complete."

(7) Plaintiff requested official election returns from the Secretary of State, Mr. Bremer Ehrler.

(8) Mr. Ehrler said, "the election returns were not complete, but when they were complete, he would mail plaintiff copies."

(9) Mr. Ehrler never mailed plaintiff any election returns.

(10) Jackson supporters in the 1st, 4th, and 7th congressional districts, which has a sparse black population, were not given an opportunity to participate in the delegate selection process, notwithstanding the fact that Jackson was entitled to a delegate in each of these districts.

(11) Jackson supporters in the 1st and 7th district did not attend the caucuses, because were told by the Kentucky Democratic Party, that they would not be able to vote for delegates to the Democratic National Convention.

(12) Plaintiffs and other registered Jackson supporters attended the Caucus in the 4th district held in Carrollton, Ky. on April 2, 1988.

(13) Plaintiffs and other Jackson supporter were told that they could not participate in the Caucuses.

(14) Plaintiffs objected and asked to see the statewide vote tablulations and how it was determined that Jackson received no delegate in the 4th district.

(15) No vote tabulations were available and no explanation was given plaintiffs as to why Jackson received no delegate in the 4th.

(16) Upon filing a handwritten challenge at the caucus, Jackson supporters in the 4th were permitted to caucus and select prospective delegates to the Democratic National Convention.

(17) Plaintiff was selected as a prospective delegate to the Democratic National Convention on April 2, 1988, as were white Prospective delegates who were supporting white candidates.

(18) After filing a typed discourse of the challenge (Ex. A), Plaintiffs received from the Kentucky Democratic Party on April 8, 1988: (1) Statewide Vote tabulation (Ex. B), (2) Regulations of compliance assistance commission, (Ex. C), and (3) the Kentucky Delegation Selection Plan for the 1988 Democratic Convention. (Ex. D).

(19) On April 11, 1988, Pursuant to the Kentucky plan (Ex. D) *Section viii, Challenges. Section B Challenges to Implementations.* Plaintiffs filed a Challenge with the Democratic Party of Kentucky. (Ex. E).

(20) In the Challenge, Plaintiffs contended that, (1) the apportionment of delegates in the 1st, 4th, and 7th Congressional District did not express the presidential preference of the primary voters of those districts, (2) Jackson had reached the 15 per cent threshold statewide and any effort to dilute votes was invidious discrimination, (3) Plaintiffs had retabulated and submitted the correct apportionment of delegates as mandated by the Kentucky Democratic Party, the Democratic National Committee and/or the one man, one vote rule.

(21) The Kentucky Democratic Party does not deny that Jackson is entitled to nine (9) Delegates and five (5) alternates to the Democratic National Convention to be held in Atlanta in July of 88, or that the way the Kentucky plan was implemented diluted the vote in the 1st, 4th, 7th district in violation of the one man, one vote rule.

(22) Plaintiffs could not have challenged the implementation of the Kentucky plan until the violations occurred on April 2, 1988.

(23) The Kentucky Democratic Party is in default as to

plaintiffs' challenge filed on April 11, 1988, (Ex. E), in that the Kentucky Democratic Party did not file a verified answer within seven days of service of the challenge as required by CAC REG. 5.03. P. 25, 26 Also see Ex. F.

(24) On Appeal Plaintiffs (challenger) were entitled to a decision on the pleading. Ex. C, CAC REG. 5.05 (2) P. 28.

(25) Failure of the court to take remedial measures for these violations will spur defendant, Kentucky Democratic Party and those acting in concert with them to aggressive, illegal and oppressive sanction against plaintiffs and others similiarly situated.

(26) The situation here is most certain to reoccur, unless the court takes measures to prevent it.

(27) Plaintiffs were entitled to a decision on the pleadings from the Compliance Assistance Committee. CAC REG. 5.05 (2) P. 25, 26. (Ex. C).

(28) The Standing Committee on Credentials' opinions and order dismissing plaintiffs challenge without a hearing was spurious.

(29) Kentucky's implementation of its delegate selection plan (Ex. D) with the Democratic National Committee's approval (Ex. H) leave the March 8 Primary in Kentucky, an exercise in futility.

(30) The Kentucky Democratic Party plans to further violate the spirit of the one man, one vote rule when it selects it at-large delegates and alternates, believed to be on June 11, 1988, at 2:00 p.m.

(31) The Democratic National Committee permits delegates to be selected up until June 18, 1988.

/s/ EDDIE THOMSPON, JR.

/s/ ISIAH SMITH

Subscribed and sworn to before me this 2 Day of June 1988

/s/ MARILYN SMITH
Notary

My Commission expires on 3-16-92

WHEREFORE, Plaintiffs pray this court:

(1) Assume jurisdiction of this case under the voting rights act of 1965, 42 USCA 1973 (Congressional District apportionment infractions) and 42 USCA 1983, 1985.

(2) The Court appoint a 3 Judge panel, if the court deems it necessary.

(3) Enter an order certifying that this is a proper class action pursuant to Rule 23 (a) and (b) (2) of the Federal Rules of Civil Procedural.

(4) Enter a preliminary injunction in accordance with the verified complaint herein, without security, restraining the Kentucky Democratic Party, Ms. Goins Ms. Kearns, their agents, attorneys, successors and those acting in concert with them, from arbitrarily appointing at-large delegates and alternates on June 11, 1988, that are in violation of the one man, one vote rule, until such time as this court may hold a hearing in this matter.

(5) Enter a preliminary and permanent injunction in accordance with the verified complaint herein, without security, restraining defendants, Kentucky Democratic Party, Ms. Goins, Ms. Kearns, the Democratic National Committee, Compliance Assistance Committee, Standing on Credentials, Mr. Carey, Mr. Irvis, their agents, successors, attorney, representatives and those acting in concert with them, from recognizing any delegation from Kentucky that is not allocated in a fashion that fairly reflects the expressed Presidential Preference of the Primary Voters in the March 8, 1988 Kentucky Primary Election. (DNC RULE 12A), and as more particularly set out in the challenge. (Ex. E, P. 4)

(6) Issue a declaratory judgment that the practice, customs, and policies relative to allocation of Kentucky delegates to the Democratic National Convention based upon the Presidential Preference Primary held in Kentucky on March 8, 1988, is unconstitutional and void in that it:

(a) Violates the one man, one vote rule.

(b) Denies equal protection of the law under First, Fourteenth, Fifteenth, and Nineteenth Amendments to the U.S. Constitution.

(c) Denies due process of law under the First, Fourteenth, Fifteenth, and Nineteenth Amendments to the U.S. Constitution.

(d) Violated plaintiffs rights under the First, Fourteenth, Fifteenth, and Nineteenth Amendments to the U.S. Constitution.

(e) Exceeded the authority of defendants under Federal Law.

(7) Issue a permanent injunction restraining defendants, their agents, successors, employees, attorneys, and those acting in concert with them from recognizing any delegation from Kentucky to the Democratic National Convention in July of 1988 that is in violation of the one man, one vote rule or denies Jackson at least 9 delegates and 5 alternates.

(8) Award to Plaintiffs their costs and disbursements herein, as well as reasonable attorney fees.

/s/ ISIAH SMITH

EDDIE THOMPSON, JR.
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(606)-491-6278

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

NO. 88-99

EDDIE THOMPSON, JR., ET AL,

Plaintiffs,

vs.

KENTUCKY DEMOCRATIC PARTY, ET AL,

Defendants.

Present:

Hon. WILLIAM O. BERTELSMAN, Judge
YELTON, Deputy Clerk
CRANDALL, Court Reporter

EDDIE THOMPSON, JR. Pro Se
ISIAH SMITH, Pro Se
Attorneys present for plaintiffs

MICHAEL McKINNEY
STEPHEN McMURTY
Attorneys present for defendants

**HEARING**
(Filed June 10, 1988)

On June 10, 1988 the above-styled case was called for a hearing on plaintiffs' motion for a Temporary Restraining Order, at which time said matter was taken under advisement, with the Court directing as follows:

1) Plaintiffs are given until Monday, June 13, 1988 within which to file a Response to defendants' response:

2) Defendants are given a period of three (3) days thereafter within which to file a Reply thereto.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

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NO. 88-99

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EDDIE THOMPSON, JR., ISIAH SMITH,

Plaintiffs,

vs.

KENTUCKY DEMOCRATIC PARTY, ET AL,

Defendants.

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**ORDER**
(Filed June 14, 1988)

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This matter is before the court on the motion of plaintiffs for a preliminary injunction, and the court being advised,

IT IS ORDERED that a hearing on such motion be, and it is, hereby set for FRIDAY, JUNE 10, 1988 at 10:00 A.M.

This 14th day of June, 1988.

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/s/ WILLIAM O BERTELSMAN,
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

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CIVIL ACTION NO. 88-99

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EDDIE THOMPSON, JR. AND ISIAH SMITH,

Plaintiffs,

vs.

KENTUCKY DEMOCRATIC PARTY, PAT GOINS, DEMOCRATIC NATIONAL COMMITTEE, COMPLIANCE ASSISTANCE COMMITTEE, STANDING COMMITTEE ON CREDENTIALS, AND K. LEROY IRVIS,

Defendants.

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**JUDGMENT**
(Filed July 19, 1988)

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Pursuant to the Opinion and Order entered concurrently herewith, and the court being advised.

IT IS ORDERED AND ADJUDGED that the complaint herein be, and it is, hereby DISMISSED, with prejudice, at the cost of the plaintiffs herein.

This 19th day of July, 1988.

/s/ WILLIAM O. BERTELSMAN,
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

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CIVIL ACTION NO. 88-99

---

EDDIE THOMPSON, JR. AND ISIAH SMITH,
Plaintiffs,

vs.

KENTUCKY DEMOCRATIC PARTY, ET AL,
Defendants.

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**OPINION AND ORDER**
(Filed July 19, 1988)

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This matter is before the court on the motion of plaintiffs for a preliminary injunction and defendants' motion to dismiss. The plaintiffs in this case are essentially asking the court to interpret the rules of the Kentucky Democratic Party for delegate selection to the Democratic National Convention. They argue that the rules do not require a candidate to receive the fifteen percent threshold in each congressional district to be awarded delegates to the convention. The Kentucky Democratic Party contends that the rules do contain such a threshold requirement. The question is one which is not justiciable in federal court according to the political question doctrine which the Supreme Court outlined in *Baker* v. *Carr*, 369 U.S. 186 (1962). A political party's convention has the exclusive power to determine which delegates it recognizes. *Stephenson* v. *Election Commissioners*, 118 Mich. 396, 76 N.W. 914. In *O'Brien* v. *Brown*, 409 U.S. 1, 4 (1972),

the United States Supreme Court noted that "[j]udicial intervention in this area [delegate selection] traditionally has been approached with great caution and restraint." The Court stated that it had "grave doubts" about the justiciability of interference in delegate selection. *Id.* at 4. It also stated, "It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra party disputes as to which delegates shall be seated. Thus, these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties." *Id.*

The Court has continued to express its reluctance to have lower courts become involved in political parties' disputes. In *Republican State Central Committee of Arizona* v. *Ripon Society, Inc.*, 409 U.S. 1222 (1972), Chief Justice Rehnquist, in his capacity as Circuit Judge, stayed a district court's order which enjoined the Republican National Committee's implementation of its delegate selection plan. He relied upon the language in *O'Brien* and the likelihood of error by the lower courts in staying the district court, which had held that the plan was unconstitutional. In *Cousins* v. *Wigoda*, 419 U.S. 477, 483 n. 4 (1975), the Court expressly left open "to what extent principles of the political question doctrine counsel against judicial intervention," after it had held that Illinois state law concerning the qualifications of convention delegates did not control contrary national party rules.

The Circuit Courts of Appeals have interpreted these cases as imposing a restraint on the justiciability of political parties' disputes. In *Bachur* v. *Democtatic National Party*, 836 F.2d 837 (4th Cir. 1987), the Fourth Circuit Court of Appeals held that the question of whether a Democratic National Party Rule which required each state delegation plan to provide for equal division between men and women was unconstitutional was a nonjusticiable question. The court emphasized that the political parties' rights of political associations entitled them to determine their own criteria for selection of delegates to the national convention, and that this first amendment right

outweighed the slight restriction placed on the plaintiff delegate's fourteenth amendment rights. *Id.* at 841.

In *Wymbs* v. *Republican State Executive Committee of Florida*, 719 F.2d 1072 (11th Cir. 1983), the Eleventh Circuit held that the constitutionality of the Republican Party's convention delegate selection rule was nonjusticiable. *Wymbs* involved an allegation that the Republican Convention's method of selecting delegates was violative of the equal protection clause of the fourteenth amendment. Citing *O'Brien* and applying the criteria set forth in *Baker* v. *Carr*, 396 U.S. (1962), the court stated that "this court is an inappropriate body to decide how the Florida delegation to the Republican National Convention should be selected." *Id.* at 1082.

Applying the criteria set forth in these holdings, it is clear that plaintiffs' claim is a nonjusticiable political question. Plaintiffs are asking this court to interpret the rules for delegate selection of the Kentucky Democratic Party, and if the interpretation is not in their favor, to hold that the delegate selection rules are unconstitutional. Just as the court in *Wymbs* was an "inappropriate body to decide how the Florida delegation to the Republican National Convention should be selected," this court is an inappropriate body to determine how the delegates to the Kentucky delegation to the Democratic National Convention should be selected. To decide such a question would involve the court in "an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217.

The rules for the selection of delegates to the national convention were approved by the Democratic National Committee in 1987, over a year before the Kentucky primary. Plaintiffs cannot maintain, therefore, that this plan was implemented after the primary to deny them their constitutional rights.

Defendants have followed the requirements for delegate selection contained in the National Committee and the Kentucky Democratic Party's delegate selection plan. An inquiry into the constitutionality of this plan would require the court to become involved in what is essentially a political question.

There are no "judicially discoverable and manageable standards for resolving" the issue, as the Supreme Court required in *Baker*, 369 U.S. at 710. It would be legally and practically impossible for the court to manage the internal affairs of the Kentucky Democratic Party. It would also violate the members of that party's first and fourteenth amendment rights to freedom of political association.

For these reasons, the court advised,

IT IS ORDERED that the motion of defendants to dismiss be, and it is, hereby granted. A separate Judgment will enter concurrently herewith.

This 19th day of July, 1988.

/s/ WILLIAM O. BERTELSMAN,
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

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CIVIL ACTION NO. 88-99

---

EDDIE THOMPSON, JR. AND ISIAH SMITH,
Plaintiffs,

vs.

KENTUCKY DEMOCRATIC PARTY, PAT GOINS,
DEMOCRATIC NATIONAL COMMITTEE,
COMPLIANCE ASSISTANCE COMMITTEE,
STANDING COMMITTEE ON CREDENTIALS,
K. LEROY IRVIS,
Defendants.

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**ORDER**
(Filed August 30, 1988)

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This matter is before the court on the motion of plaintiffs for this court to reconsider its Opinion and Order dated July 19, 1988, and defendants having filed a response thereto, and the court having reviewed the record and being advised,

IT IS ORDERED that plaintiffs' motion to reconsider be, and it is, hereby DENIED.

This 30th day of August, 1988.

/s/ WILLIAM O. BERTELSMAN,
Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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NO. 88-6114

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EDDIE THOMPSON, JR.; ISIAH SMITH,
Plaintiffs-Appellants,

vs.

KENTUCKY DEMOCRATIC PARTY; PAT GOINS; DEMOCRATIC NATIONAL COMMITTEE; COMPLIANCE ASSISTANCE COMMITTEE; STANDING COMMITTEE ON CREDENTIALS; K. LEROY IRVIS,
Defendants-Appellees.

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**ORDER**
(Filed April 13, 1989)

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BEFORE: KEITH and KENNEDY, Circuit Judges; and McQUADE, District Judge.*

These pro se plaintiffs appeal the judgment of the district court dismissing their cause of action filed pursuant to 42 U.S.C. § 1973, and 42 U.S.C. §§ 1983 and 1985. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the record and the briefs, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Plaintiffs, sought an interpretation of the rules of the Ken-

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* The Honorable Richard B. McQuade, Jr., U.S. District Judge for the Northern District of Ohio, sitting by designation.

tucky Democratic Party for delegate selection to the Democratic National Convention. The district court dismissed the complaint with prejudice because it involved a nonjusticiable political question.

On appeal, the plaintiffs argue that the Kentucky Democratic Party and the Democratic National Committee unconstitutionally applied the delegate selection rules so as to discriminate against them and that the delegation selection rules are per se racially discriminatory.

Upon review, we find that the district court did not err by dismissing the complaint on the grounds that it involved a nonjusticiable political question. *See Wymbs* v. *Republican State Executive Comm. of Fla.*, 719 F.2d 1072, 1076 (11th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984), citing *O'Brien* v. *Brown*, 409 U.S. 1 (1972).

Accordingly, for the reasons set forth in the district court's opinion and order dated July 19, 1988, we hereby affirm the judgment of the district court pursuant to Rule 9(b)(5), Rules of the Sixth Circuit.

ENTERED BY
ORDER OF THE COURT

/s/ LEONARD GREEN
Clerk

MANDATE ISSUED: 06/14/89
COSTS TAXED: NONE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 88-6114

EDDIE THOMPSON, JR., ET AL,
Plaintiffs-Appellants,

vs.

KENTUCKY DEMOCRATIC PARTY, ET AL,
Defendants-Appellees.

**ORDER**
(Filed June 5, 1989)

BEFORE: KEITH and KENNEDY, Circuit Judges; and McQUADE*, United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY
ORDER OF THE COURT

/s/ LEONARD GREEN, Clerk

* Hon. Richard B. McQuade sitting by designation from the Northern District of Ohio.

June 5, 1989

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RE: 88-6114
Thomspon vs. KY Democratic Party
District Court No. 88-00099